84-1799

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No. 84-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LARRY FRENCH,

Petitioner,

vs.

MEAD PAPER CORPORATION
FORMS PAPER DIVISION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

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25 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a male employee has the same protections under Title VII as a female employee in a case involving alleged sexual harassment.

2. Whether the mere allegation by a female employee of sexual harassment against a male employee constitutes a legitimate, non-discriminatory reason under Title VII to insulate an employer against liability in a sex discrimination case.

PARTIES TO THE PROCEEDING

The sole parties to the proceeding are the set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Larry French, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, which affirmed and adopted the opinion of the United States District Court, Southern District of Ohio.

OPINIONS BELOW

The Sixth Circuit's per curiam opinion, No. 83-3747 (6th Cir., February 15, 1985) is set forth in the appendix, 1a. The Sixth Circuit adopted the opinion of the United States District Court, Southern District of Ohio, set forth in Appendix 7 - 20.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1985. This petition was filed within ninety days thereafter. This Court's jurisdiction is envoked under 28 U.S.C. § 1254 (1).

FEDERAL STATUTE AND REGULATION

The federal statute involved in this case is Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (e), et. seq. The Equal Employment Opportunity Commission's Guidelines on Sexual Harassment, 29 CFR § 1604.11 are also involved in the case.

STATEMENT OF THE CASE

The petitioner, Larry French, was an employee with the respondent, the Mead Corporation, for almost twenty-four years; he was a first line supervisor for approximately seven years and had received good to excellent job evaluations as a supervisor during that period. He never received any written or verbal job reprimands during his employment.

The petitioner's responsibilities included assigning "extra crew" employees to temporary job positions within his department; extra crew employees fill temporary jobs for employees who are on sick leave or vacation, or if a temporary need exists for additional employees. Such assignments to the various departments are made in the personnel office and are made on the basis of date of hire seniority; once the extra crew employee reaches the department, he is assigned on the basis of need within the discretion of the tour supervisor and not necessarily on the basis of seniority. The normal procedure for assignment of all extra crew employees was according to a schedule prepared by the departmental head. The tour supervisor would make asignments based on the schedule.

During the week of June 2, 1980, Anna Marie Bales, an extra crew employee, was assigned to the petitioner's department and assigned

the job of "Miscellaneous", a job classification to which Ms. Bales could be assigned to any position in the department. The departmental head made the assignment for Ms. Bales. On June 2, Ms. Bales did not report for work; on June 3, the petitioner had an off day and did not work; the substitute tour supervisor assigned Ms. Bales to a "rewinder helper" position. On June 4, the petitioner assigned a regular and more senior employee to the rewinder helper position, as permanent employees had preference over extra crew employees. Ms. Bales complained to the petitioner that she wanted the "rewinder helper" job. The petitioner told her that he would assign her to a position as soon as he finished his paperwork, which was his customary and usual practice. Ms. Bales became upset, left the department and complained to the personnel manager, Linda Oney, that she should have had that job. She also told Oney that the petitioner had "touched her" approximately one year earlier, in May 1979. Ms. Oney took the complaint and sent her back to the department where the department head assigned her to "sweeping up". Ms. Bales had a history of complaining about her job assignments to the departmental head.

Nothing else was done by the company on Ms. Bales' complaint, except that Ms. Bales was re-assigned to another department. The EEO officer for the City of Chillicothe, Ohio received a complaint from Ms. Bales' husband about alleged sexual harassment, and although having no jurisdiction over the respondent, set up a meeting to transmit the complaint. As a result of the meeting, the company proceeded to conduct an investigation concerning the Bales' complaint, but did not inform the petitioner. Ms. Bales was again interviewed, and gave three of her friends as persons who could support her allegation. The three women were interviewed and each gave several incidents where the petitioner allegedly "touched them" or made sexual oriented statements to them; none of the alleged incidents were "timely", having occurred over a period of years. None of the other women, however, ever complained about alleged sexual harassment nor did they testify that such statements were "unwelcomed". All the women testified at trial that they were able to perform their jobs in a satisfactory manner and two of the three women testified that they "bid" or asked for the petitioner's tour after the alleged incidents occurred.

The petitioner had two meetings with respondent's officials after the investigation commenced. The first time he was notified was at a June 18, 1980 meeting when he was told of the Bales' "assignment" complaint, and another incident, none of which directly involved any alleged sexual harassment. The next meeting occurred on June 29, 1980, when he was suspended. He realized for the first time that alleged sexual harassment was an issue, and requested the respondent to conduct an investigation to include several female workers on his tour that had worked for him for several years. The respondent "promised" to conduct a full investigation. The respondent, however, refused to interview such witnesses because they felt that the females would "support" the petitioner.

On July 1, 1980, the petitioner was terminated for sexual harassment. The respondent terminated the petitioner because "the federal government would not settle for less than a termination". The termination violated the respondent's own policy on discipline by refusing to conduct a full investigation, and failure to give the petitioner a "full opportunity" to rebut the allegations. The respondent's official, responsible for the recommendation for the termination, testified at trial that based on the statements of the females that it was not necessary to obtain any rebuttal from the petitioner. The respondent specifically terminated the petitioner for sexual harassment based on the Equal Employment Opportunity Commission's "then" proposed guidelines on sexual harassment. The respondent has never had any policy on sexual harassment or did it adhere to the EEOC's guidelines on sexual harassment.

At trial, four, longtime, female employees testified that the petitioner never engaged in any activity that they would regard as "sexual harassment". After the petitioner's termination, approximately thirty (30) employees, male and female, signed a petition requesting the reinstatement of the petitioner because he was unjustly terminated, and submitted it to the respondent's officials.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE SIXTH CIRCUIT DENIES AND HAS THE EFFECT OF DENYING THE PETITIONER HIS TITLE

VII PROTECTIONS AGAINST SEX DISCRIMINATION SOLELY BECAUSE HE IS A MALE. SUCH A DECISION IS INCONSISTENT WITH THE DECISIONS OF THIS COURT.

The employer, with the approval of the Courts below, terminated a long time male employee based on the mere allegation of a female employee that the male employee was guilty of sexual harassment. The evidence indicated that the female employee made the vindictive allegation because she did not receive a job assignment she wanted, but which she was not entitled. The alleged "touching" incident occurred over one year prior to the allegation.

The respondent terminated the petitioner solely based upon the statements of the females, and the employer felt that it was not necessary to advise the male employee of the allegations against him or obtain rebuttal from the petitioner. The respondent based the termination of the "then" proposed Equal Employment Opportunity Commission's Guidelines on Sexual Harassment, in spite of the fact that the respondent never adhered to the guidelines or adopted any policy against sexual harassment.

The respondent failed to apply its own disciplinary policy to the male petitioner as it provided to the female employees, and terminated the petitioner based upon a male stereotype. The respondent also appeased the female employee by terminating the male employee. To avoid the charge, the respondent intentionally "sacrificed" the petitioner, rather than deal with a potential frivolous sex charge. Such action and difference in treatment by the respondent violates Title VII. In McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976), this Court granted protection to whites under Title VII; similarly, males should receive the same protections as females under Title VII. See also Connecticut v. Teal, 457 U.S. 440 (1982); Lincoln v. Board of Regents of Univ. System, 697 F.2d 920 (CA 11 1983); cert. denied, 104 S. Ct. 97 (1983) and EEOC v. Brown and Root, Inc., 688 F.2d 338 (CA5 1982); In a sexual harassment case the McDonnell Douglas v. Green, 411 U.S. 792 (1973) guidelines for proving a prima facie case of discrimination do not readily apply. The

courts below found no sex discrimination largely due to forcing the facts of this case into the McDonnell Douglas prototype, which facts do not fit that mold.

The issue of sexual harassment is of vital concern to employers and employees; the lower Court's decision leaves the male employee with little or no protection under Title VII, and in a strikingly different position than his female counterpart based upon sexual stereotypes. The Court has not addressed this specific issue, but a fair reading of its decisions reveal equal protections for both males and females under Title VII. The Court should grant certiorari to decide this important issue.

CONCLUSION

For the reasons expressed above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Andrew J. Ruzicho, a member of the Bar of this Court and counsel for Petitioner herein, hereby certifies that on this 15th day of May 1985, three copies of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit were served, postage prepaid, upon Richard A. DuRose, Smith & Schnacke, 2000 Court-House Plaza, NE, P.O. Box 1817, Dayton, Ohio 45401.

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No. 84-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LARRY FRENCH,

Petitioner,

vs.

MEAD PAPER CORPORATION
FORMS PAPER DIVISION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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NOT FOR PUBLICATION

No. 83-3745

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LARRY FRENCH,

Plaintiff-Appellant,

v.

MEAD PAPER CORPORATION, FORMS PAPER DIVISION,

Defendant-Appellee.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO
C-2-80-1095

BEFORE: KENNEDY, CONTIE and MILBURN, Circuit Judges

Per Curiam. Upon consideration of the briefs and record herein and after oral argument, the judgment of the district court is AFFIRMED for the reasons stated in the entered opinion of the district court.

ISSUED AS MANDATE: March 11, 1985
COSTS: None

FILED
FEB 15, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Larry French

vs.

Case Number C-2-80-1095

The Mead Corporation,
Mead Forms Division

JUDGMENT

This action came on for consideration before the Court, The Honorable Robert M. Duncan, United States District Judge, presiding. The issues having been duly considered and a decision having been duly rendered, IT IS ORDERED AND ADJUDGED THAT: plaintiff has failed to prove his case. JUDGEMENT is entered for the defendant.

Dated at Columbus, Ohio, this 3rd day of October, 1983.

KENNETH J. MURPHY, CLERK

FILED
October 3, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Larry French

Plaintiff

vs.

Case Number C-2-80-1095

The Mead Corporation,
Mead Forms Division

Defendant

ORDER

Plaintiff, a white male, was terminated from employment by the Mead Paper Corporation Forms Paper Division (Mead), asserting that the termination was gender-based discrimination. The plaintiff presented a unique theoretical basis for recovery under Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. After a trial to the Court, the Court believes plaintiff's view of the law inappropriate and factually unsupportable. Findings of fact and conclusions of law follow.

I

Larry French began his employment with Mead at its Chillicothe, Ohio facility on October 6, 1956. In December 1973 he was promoted from the hourly employees' bargaining unit to tour supervisor, a management position. While in this position, French received good to excellent job evaluations.

A number of Mead management employees were involved in the series of events that culminated in French's firing, and it is helpful to this discussion that they be identified by name and workplace responsibility. Fred Eblin was the labor relations manager primarily respon-

sible for overseeing day-to-day labor matters. Linda Oney was an employment manager who reported to Eblin and was involved with EEOC matters, hiring, disciplining employees, and assigning "extra crew" to various departments. James Rodkey was the employee relations manager for the Chillicothe Division and Eblin's immediate supervisor. Darrell Pate was Vice President of Human Resources and Rodkey's immediate supervisor. The operations manager of the mill was Tom Lovensheimer who was second in command under Carter Smith.

In June 1980, Charles Cartwright was superintendent of the carbonless finishing area and reported to Warren Engel, the manager of the carbonless production group. Engel reported directly to Lovensheimer, the operations manager.

On June 4, 1980, an "extra crew" woman employee, Annmarie Bales, came to Oney's office and complained that French, her supervisor, failed to assign her to a more favorable job claiming that she was entitled to the rewinder job as a senior member of the "extra crew." She told Oney that Gary Clemmons, a supervisor on another tour, had assigned her to the No. 56 rewinder job, but that French had refused to assign her to that job. The rewinder job paid 30-40 cents more per hour than the job to which Bales was assigned by French.

"Extra crew' employees fill temporary vacancies created within a department by employees on vacation or sick leave, or in the event a temporary need for extra employees arises in a department. Within a department a tour supervisor has some discretion in assigning "extra crew" employees; the better jobs are usually assigned to the more senior members of the "extra crew."

According to French, he was off on June 3 and Gary Clemmons was the substitute tour supervisor. Clemmons assigned Bales to the rewinder helper job; the next day French assigned Mr. Berman, an employee who was more experienced on the rewinder, to the rewinder helper job. Bales then complained to French about the assignment and presented the matter to Oney as mentioned above.

Bales also told Oney that plaintiff had occasionally put his hands on her, patted her on the rear, and that she had to tell him to leave her alone. At that time Oney told her to return to her assigned department. Bales was reassigned to another department on June 5.

On June 10, 1980, Lawrence Brown, the EEO coordinator for the City of Chillicothe, visited Oney and Eblin at the plant. Brown told them that he had received information from Bales, whose husband worked for the City and is a friend of Brown's about a sexual harassment problem at Mead regarding French.

After meeting with Brown, Eblin told his supervisor, Rodkey, about Brown's comments. Rodkey, concerned about an EEOC charge and the alleged improper conduct of a supervisor, instructed Eblin to investigate the matter, determine the facts, and make a recommendation.

Eblin and Oney met with Bales on June 11. Bales told Eblin that French had been giving her undesirable and improper work assignments. She related an incident in 1979 when plaintiff rubbed his hands up and down her arms from her shoulders to her waist; however, she made no complaint to Mead officials. Bales testified that on June 4 she consulted Oney because "I felt that he was putting me through something agonizing" and that she felt she was "given a hard time because I turned him down." On deposition Bales stated that she felt French was being "pricky."

Bales also told Eblin and Oney that there were several other women on "extra crew" who would support her charge that plaintiff was harassing women. Beverly Holbert, Gayle Vandergriff and Sheila Holmes were then interviewed at the Company's request.

Before meeting with the women named by Bales, Eblin and Oney were approached by Rebecca Coey, who also worked on the extra crew. Coey was upset because plaintiff had assigned her the task of gluing rolls with a defective glue gun. Coey told Eblin and Oney that plaintiff had never tried anything with her, but that she had observed plaintiff touching other female employees on his tour by putting his

hands directly under their breasts.

Eblin and Oney met with Beverly (Holbert) Bruce on June 13. She had worked "extra crew" under French's supervision on a number of occasions. She related to Eblin and Oney that plaintiff put his arms around her and wanted to kiss her, and said to her that "if you didn't want to go along with the things he wanted to do, he would give you really bad things to do."

Oney also met with Gayle Vandergriff on June 13. Vandergriff had worked under plaintiff's supervision in the carbonless finishing area while on "extra crew." She told Oney that she had problems with plaintiff. She described an incident in which plaintiff fell on top of her while trying to back her up against a "bubble pack." Plaintiff fell on top of her and didn't want to get off. Vandergriff also told them that she had observed Bruce very upset and in tears because plaintiff had put his hands on her leg while she was cleaning a paper machine.

Neither Bruce nor Vandergriff had complained to company officials about plaintiff.

After the interviews with the women, French was called in to meet with Eblin, Cartwright, and Engel. Eblin, speaking from notes taken by Oney of the interviews with the women and from his memory, related to the plaintiff the accusations. French offered some explanation of two or three of the claimed incidents, and basically denied that the others occurred. On his behalf, plaintiff French suggested that the supervisors, in the course of their investigation, should talk to some of the employees on his shift, specifically Ms. Fitchpritch, Ms. Manson and Ms. Ragland. This first meeting lasted 45 minutes to an hour.

Rather than talk with the persons suggested by French, Eblin decided to consult women "who had worked on his (French's) trick or were working on his trick who were not associated with the problem, and to my knowledge didn't know anything about the problem or weren't involved one way or the other." (Tr. 110.) He proceeded to speak with Rose Routte and Linda Ratliff.

Eblin, Oney and John Allen, a union official, met with Linda Ratliff on June 23. She stated that there was a "bad situation" on plaintiff's tour, that there was "a lot of hanky-panky going on," and that other tours were different.

Rose Routte was also interviewed on June 23. She indicated that plaintiff had put his arm around her on one occasion, that she had shied away from him, and that he "got the message."

Eblin reported to Rodkey, his superior, the results of his investigation. Eblin reported that he believed the information received regarding French's conduct to be true and further recommended that French be terminated. Obviously, Eblin did not believe or otherwise credit French's explanations or denials. Eblin concluded that termination was necessary since he believed plaintiff French, as a supervisor, had taken advantage of his authority.

Eblin and Oney met with Sheila Holmes, another one of the women originally named by Bales, on Monday, June 30. Holmes had been assigned to plaintiff's tour on the "extra crew" on previous occasions. Holmes related several incidents in which plaintiff solicited sex from her. On one occasion, plaintiff told Holmes to go downstairs. When she got on the elevator, plaintiff stepped in behind her. Plaintiff stated, "I am one hell of a man and I won't disappoint you." He also said, "I want to f--- you," and then reached over and shut off the light switch. Holmes responded, "Mr. French, if you don't turn on the light, I'm going to have to smack you." Plaintiff turned the light on and stepped out of the elevator.

On another occasion when Holmes was upstairs sweeping, plaintiff paged her on the intercom. Holmes answered the page by telephone. Plaintiff asked her, "Do you want to fool around?" Holmes responded, "All I'm trying to do is just do my job," and then hung up.

On yet another occasion, plaintiff approached Holmes in front of a group of employees and asked her if she wanted to "f----." Plaintiff also told Holmes that he "had the hots for her." Holmes was embarrassed by these incidents and did not think that plaintiff was joking around. She tried to avoid having contact with plaintiff--when she saw him

coming, she would try to move away. She stated that other foremen did not conduct themselves in the same manner as plaintiff.

Eblin concluded that the information he received from the female employees was true. He did not believe plaintiff's denial. The stories from the women were varied, and evidenced continued sexual harassment over a period of time. It was Eblin's belief that any supervisor who would take advantage of his supervisory position did not have the right to remain employed by the Company. Eblin recommended that plaintiff be terminated.

Lovensheimer returned from vacation on June 28 and learned about the investigation of plaintiff's conduct. Lovensheimer obtained copies of Oney's notes from the various meetings and arranged to talk to plaintiff on the following day, Sunday, June 29. Lovensheimer met with plaintiff, confronted him with the various charges, showed him one of the statements, and gave him the opportunity to rebut the charges. Generally, plaintiff did not deny putting his hands on female employees, but stated that it was his way of communicating. He denied any wrongdoing. Lovensheimer told plaintiff that it would be best if he stayed out of the mill until the investigaton was completed, and that he was temporarily suspended. This meeting lasted almost an hour.

Lovensheimer asked both Eblin and Oney whether or not they believed the complaining women. Both answered in the affirmative. Lovensheimer also met with Cartwright. He also spoke with Smith and Pate, who concurred in the judgment that French should be dismissed. The next day, July 1, 1980, Lovensheimer called French to his office and gave him the option of resigning rather than being fired.

There is no evidence of any problems with or adversity between French and any of the Mead management personnel mentioned herein prior to June 1980, with the exception of Cartwright. Earlier Cartwright saw French patting a woman on the back. Cartwright told him, "I would appreciate it if you would stop it, Larry, because it is going to end up getting us both in trouble." (Tr. 130-131.)

French's supervisory position was filled by Robert Mischae, a white

male.

Three witnesses, Ms. Fitchpritch, Ms. Ragland, and Ms. Johnson, permanent employees who were under the plaintiff's supervision for approximately six years, testified that the plaintiff did not engage in any conduct that constituted "sexual harassment." They also testified that the working atmosphere was enjoyable.

Ms. Fitchpritch and Ms. Ragland also testified that Ms. Bales, Ms. Vandergriff, Ms. Holbert and Ms. Holmes were friends at work and on occasion rode to work together. Ms. Fitchpritch and Ms. Ragland gave testimony which conflicted with testimony of Holmes.

Regarding alleged incidents of sexual harassment at work, these latter employees testified that the plaintiff never made any sexual advances or sexual comments to any women employees in their presence.

After the plaintiff's termination, permanent employees whom he supervised, both male and female, signed a petition stating that his termination was unjustified and requesting reinstatement of the plaintiff. The petition was submitted to Mr. Lovensheimer on or about July 5, 1980, and was submitted because the regular employees on the plaintiff's tour were not contacted or interviewed by the company officials.

The defendant corporation's disciplinary procedures are set forth in a Supervisors' Manual. The procedure for disciplining an employee after a complaint is lodged against the employee is as follows:

a. Review the employee's personnel file to determine whether there exist prior violations; (prior reprimands would be in writing).

b. After reviewing the file, give the employee an opportunity to present hs version of the facts. The manual stresses that "the employee would be given the opportunity to present his arguments fully during the interview."

c. After a full investigation, the company will determine the appropriate action based upon the Supervisors' Manual. The purpose of any disciplinary action "is not to punish, but to discourage repetition of misbehavior by the offender or another following his example."

The defendant company did not have an officially articulated policy against sexual harassment. However, Cartwright admonished French and other new supervisors during their training that more women would be working in the plant and that supervisors should not get involved with women employees working in the plant under their supervision.

As a matter of custom and due to the working environment at the defendant's facility, there was some touching of employees, both male and female, to gain their attention in a noisy environment. Also there was frequent horseplay among the employees, including supervisors, especially during break periods.

The company did not adhere to certain EEOC proposed guidelines concerning sexual harassment by officially disignating specific sanctions, or informing employees of the right to raise and how to raise the issue.

However, Oney, Eblin, Rodkey, Cartwright, and Lovensheimer were believable witnesses. Their beliefs that the complaints received from women employees in June of 1980 were substantially true, were not unreasonable, and were held in good faith. Moreover, it was not unreasonable for them to believe that such activity by a male supervisor produced a psychologically and emotionally unpleasant and adverse work environment for the complaining women. Although some of the problems experienced with the plaintiff occurred as early as the spring of 1979, the effect of those problems continued to be felt until plaintiff's termination.

The investigation conducted by company managers certainly could have been more thorough. Nevertheless, it was not so inadequate that it can be found that action taken thereafter was unreasonable.

All of the complaining women who gave statements to Oney and Eblin testified at trial, and generally reiterated the same facts stated in June 1980. With the benefit of hindsight after the trial, the Court is unable to discover anything that a more thorough investigation would have turned up that would amount to a significant basis for concluding that the company officials' actions were unreasonable or taken in bad faith.

Conclusions

The Court has jurisdiction in this matter pursuant to Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq.

Plaintiff does not claim that any member of the opposite sex made him the victim of unwelcome sexual advances that became a term or condition of his employment. However, he does assert that he received disparate treatment from that received by similarly situated women. In a post-trial brief he further suggests a right to recovery on a disparate impact theory. I am unable to find any facts even remotely calling for an application of the latter theory; therefore, further comment in that regard is unwarranted.

Plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. If plaintiff succeeds in proving the prima facie case, the burden shifts to defendant to articulate a legitimate, nondiscriminatory reason for the employee's termination. Once this reason is articulated, plaintiff must prove by a preponderance of the evidence that the legitimate reasons offered by defendant were not the true reasons, but were a pretext for discrimination. The ultimate burden of persuading the trier of fact that defendant intentionally discriminated against plaintiff remains at all times with the plaintiff. The defendant is not required to prove the absence of a discriminatory motive. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). See U.S. Postal Service v. Aikens, ____ U.S. ____, 103 S.Ct. 1478 (1983); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 804 (1973); Canham v. Oberlin College, 666 F.2d 1057 (6th Cir. 1981), cert. denied, 456 U.S. 977 (1982).

The United States Court of Appeals for the Sixth Circuit has held that, in a discharge case, a prima facie case under McDonnell Douglas is established when the plaintiff proves the following elements:

(i) that he belongs to a minority;

(ii) that he was satisfactorily performing his job;

(iii) that, despite this performance, he was terminated; and

(iv) that he was replaced by a non-minority worker.

Becton v. Detroit Terminal of Consolidated Freightways, supra, 68 / F.2d at 141 (applying McDonnell Douglas in an analogous case arising under 42 U.S.C. 1981). Accord: Potter v. Goodwill Industries of Cleveland, 518 F.2d 864 (6th Cir. 1975); Davin v. Delta Air Lines, Inc., 678 F.2d 567, 570 (5th Cir. 1982); Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977); Long v. Ford Motor Co., 496 F.2d 500, 505-06 (6th Cir. 1974).

Mr. French claims that he has satisfied the membership in the protected class requirement since "this requires a simple stipulation that the employee is a man or woman." (Plaintiff's post-trial brief, p. 31.) Stated another way, then, plaintiff takes the position that the protected class requirement is nonexistent in a sexual harassment case. The Court disagrees. There is no basis in law or common sense in the Mead workforce scenario to give a white male supervisor a disfavored status which would trigger an inference of discrimination. The Court notes with interest that of the approximately 100 supervisors at the facility, there was only one woman. Other than French's termination there is nothing in the Mead work environment indicating that men were disfavored in any respect. This is not to suggest that in a proper case a male cannot be a member of a protected class. See Lincoln v. Board of Regents of the University System of Georgia, et al., 697 F.2d 298 (11th Cir. 1983).

French was replaced by a white male. Therefore, the fourth prong of the McDonnell Douglas model is unsatisfied. Having failed to meet the McDonnell Douglas-type standrds, plaintiff has also failed to present a prima facie case. Without the aid of judicially created inferences there is no evidentiary basis to find that French was discharged because of his sex.

Even assuming that plaintiff had established a McDonnell Douglas prima facie case, the defendant has articulated a non-discriminatory reason for the termination. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). Essentially, Mead reasonably believed that in his supervisory capacity French had made unwelcome sexual

overtures to women which had an adverse effect on the work environment.

It is noted that even though the Court may have reached conclusions different from those of the Mead managers, it is not and should not be the Court's function to substitute its judgment for theirs unless their judgment is unreasonable or exercised in bad faith.

The next step then in the arguendo discussion is an examination of plaintiff's proofs that the reasons articulated by the defendant were pretext.

In post-trial memoranda, plaintiff has presented a number of novel approaches in arguing for recovery. However, the Court is unclear as to exactly where in this discussion such matters should be addressed. Perhaps they are aimed at showing pretext or perhaps they should have been mentioned during the prima facie case conclusions. In any event, brief comment on such arguments follows.

A

Plaintiff claims that the sexual conduct of an employee of one sex was used by an employee of the other sex to get the alleged victim discharged. This position seems to be grounded on the premise that proof of record establishes that French's conduct was legitimate sexual conduct. (Plaintiff's post-trial brief at p. 36.) This argument is misdirected. Although the total evidence adduced at trial is significant to the determination as to whether defendant's termination of plaintiff was reasonable based on the information before it at the time the adverse action was taken against plaintiff, whether or not the trial record establishes his conduct as legitimate is not the issue. In any event, the Court cannot find from the record legitimacy concerning his conduct. The evidence does not persuade the Court that the defendant was duped by Bales, Bruce, Vandergriff, and Holmes. The Court is mindful that in the plant there was evidence of frequent heterosexual touching and certain "horseplay" with a sexual overtone. In order to amount to actionable sexual harassment, however, the conduct must be unwelcome and have an adverse effect on the terms and conditions

of employment. The women's complaints satisfy such a standard; the general touching and "horseplay" does not.

B

Next, plaintiff appears to argue that had a woman been similarly situated and had manifested similar conduct towards men, she would not have been fired. There simply is no credible evidence from which such an inference can reasonably be drawn. There is no rule of law which provides that an employer may not discharge a supervisor for such conduct.

C

The fact that the company never adopted an official policy with regard to sexual harassment is not flattering to the defendant, but does not necessarily preclude them from terminating an employee for that type of behavior. Common sense teaches that the behavior the defendant believed plaintiff to have manifested was inappropriate. Whether or not French's conduct can be characterized as sexual harassment is not critical. What is critical is whether or not the defendant employer in good faith believed plaintiff to be engaged in conduct which was inappropriate in the work place. The facts of this case viewed in total context do not show that defendant's articulated basis for terminating plaintiff was pretextual.

Accordingly, plaintiff has failed to prove his case, and judgment for defendant will be entered.

So ORDERED.

Robert M. Duncan, Judge
United States District Court

Supreme Court, U.S.
FILED
JUL 10 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1799

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LARRY FRENCH,

Petitioner,

v.

THE MEAD CORPORATION, MEAD FORMS DIVISION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred in affirming the District Court's judgment in favor of Respondent, when the District Court:

1) Credited the testimony of Respondent's witnesses regarding the reasons for Petitioner's discharge from employment;

2) Properly concluded that Petitioner failed to present a *prima facie* case of sex discrimination; and

3) Determined that, even if Petitioner had established a *prima facie* case of sex discrimination, Respondent demonstrated a nondiscriminatory reason for discharging him.[1]

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[1] References are to the opinions of the United States District Court for the Southern District of Ohio and Court of Appeals for the Sixth Circuit, which are attached in the Appendix appearing at pp. 7-21 of the Petition for Writ of Certiorari. Page references to these decisions will be abbreviated "App. at ——." Page references to the Petition will be abbreviated "Pet. at ——."

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OPINIONS BELOW

Although the texts of the decisions below are not officially reported, the Order of the Sixth Circuit Court of Appeals appears in a table in the Federal Second Reporter. The citation is *French* v. *Mead Paper Corporation, Mead Forms Division*, 758 F.2d 652 (6th Cir. 1985) (Table). The District Court's decision is unofficially reported as *French* v. *Mead Corporation*, 33 Fair Employment Practice Cases 635 (S.D. Ohio 1983).

FEDERAL STATUTES OR REGULATIONS INVOLVED

Respondent agrees with the Petitioner that the statute involved in this case is Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"). Respondent denies, however, that the Equal Employment Opportunity Commission's Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11, are pertinent to this case.

COUNTERSTATEMENT OF THE CASE

A statement of the case by Respondent is necessary because the statement appearing at pp. 2-4 of the Petition for Writ of Certiorari is misleading. Petitioner has simply ignored the findings of fact made by the District Court which are dispositive of his claim. As set forth more fully below, Petitioner's entire argument is based on a view of the facts that was expressly rejected by the District Court and the Court of Appeals.

Petitioner, Larry French ("French"), a male, was employed as a mill supervisor by Respondent, The Mead Corporation, Mead Forms Division ("Mead"), until he was discharged on July 1, 1980.[2] French filed a complaint against Mead, alleging that he had been discriminated against on the basis of his sex in violation of Title VII. French's claim was tried before United States District Court Judge Robert M. Duncan in March, 1983. After a four day trial and the submission of post-trial briefs, the District Court entered judgment in favor of Mead. App. at 9-21. French appealed to the Sixth Circuit Court of Appeals, which affirmed the District Court's judgment in a per curiam decision issued after consideration of the parties' briefs and oral argument. App. at 8.

Mead presented evidence at trial which showed that French was terminated for sexually harassing female subordinates. A female employee complained of unfavorable work assignments as the result of her having rebuffed French. As a result, Mead officials investigated and concluded that French had sexually harassed a number of female employees who had worked for him. The allegations were reviewed with

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[2] The following list of subsidiary corporations and related entities is provided in accordance with Sup. Ct. R. 28.1:

Brunswick Pulp & Paper Company
Georgia Kraft Company
Seaboard Paper Company
Schoeller Technical Papers, Inc.

French on two occasions, but Mead did not believe French's denials.

The female employees testified at trial. As set forth in the District Court's opinion, French had, at various times, explicitly solicited sex, engaged in unwanted sexual touching and horseplay, and used crude language with sexual connotations. App. at 12-14. Further, there was evidence that French attempted to trade sex for more favorable work assignments. App. at 12, 13.

As a result of Mead's belief that the allegations of sexual harassment were true, it terminated French's employment. The District Court concluded, after hearing testimony from the female employees, French and Mead officials, that "it was not unreasonable for them [Mead officials] to believe that such activity by a male supervisor produced a psychologically and emotionally unpleasant and adverse work environment for the complaining women." App. at 17. Finally, the District Court was "unable to discover anything that a more thorough investigation would have turned up that would amount to a significant basis for concluding that the company officials' actions were unreasonable or taken in bad faith." App. at 17.

The Sixth Circuit Court of Appeals adopted these findings and conclusions in affirming the District Court's judgment in favor of Mead. App. at 8.

REASONS FOR DENYING THE WRIT

I. Petitioner Has Presented No Reason to Reject the Findings of Fact of the District Court

The findings of fact of the District Court established that French engaged in the sexual harassment of female employees, Mead discovered this misconduct and, as a result, terminated French's employment.

French's argument is based on a version of the facts which he failed to establish at trial. For example, French asserts his termination was based "on the mere allegations of a female employee" of sexual harassment. Pet. at 5. The District Court found, however, that the termination was based on the statements of a number of female employees. App. at 17. French asserts that Mead did not "advise [him] of the allegations or obtain his rebuttal." Pet. at 5. The District Court found that French was informed of the allegations on two occasions, and "gave him the opportunity to rebut the charges." App. at 13, 15.

Finally, French asserts that Mead failed to apply its disciplinary policy to him as it would to female employees. Pet. at 5. The District Court found that there was "no credible evidence from which such an inference [could] reasonably be drawn." App. at 21.

This Court has recently reiterated that an appellate court is bound by the district court's findings of fact unless they are "clearly erroneous" within the meaning of Fed. R. Civ. P. 52(a). *Anderson* v. *Bessemer City*, 470 U.S. ——, 105 S. Ct. 1504, 84 L.Ed.2d 518, 528 (1985). The reason for such deference is clear:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with

> experience in fulfilling that role comes expertise. Duplication of the trial judge's effort in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination. . . .

Id., 84 L.Ed.2d at 529. Where, as here, the District Court's findings "are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings." *Id.*, 84 L.Ed.2d at 529. *See also Wainwright* v. *Witt*, 469 U.S. —, 105 S. Ct. 844, 83 L.Ed.2d 841 (1985) (noting that only trial court can judge witness' demeanor and belief in what is said).

The District Court credited the testimony of Mead officials and concluded that they held a reasonable, good faith belief that French had engaged in conduct which warranted termination.[3]

II. The Courts Below Applied the Correct Legal Analysis to the Facts.

The District Court fairly applied the standards established by this Court in *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), regarding the burdens of proof and "going forward with the evidence" in a Title VII case. The District Court properly concluded that French failed to establish a *prima facie* case of discrimination under the *McDonnell Douglas* paradigm. The court noted that French was terminated by a male, that he was replaced by another male, and that there "is no basis in law or common sense in the Mead workforce scenario [where only one of 100

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[3] At best, French's argument amounts to a claim that there is another permissible view of evidence. However, "[w]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous". *Anderson* v. *Bessemer City, supra*, 84 L.Ed.2d at 528. *See Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844 (1982); *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342 (1949).

supervisors is female] to give a white male supervisor a disfavored status which would trigger an inference of discrimination". App. at 19. Having demonstrated only that he was capable of performing his job and that he was discharged, French was clearly not entitled to the benefit of a judicially created inference of sex discrimination and therefore did not establish a *prima facie* case. *See McDonnell Douglas, supra,* 411 U.S. at 802; *Becton* v. *Detroit Terminal of Consolidated Freightways,* 687 F.2d 140, 144 (6th Cir. 1982), *cert. denied,* 460 U.S. 1040 (1983); *Davin* v. *Delta Airlines Inc.,* 678 F. 2d 567, 570 (5th Cir. 1982); *Flowers* v. *Crouch-Walker Corp.,* 552 F.2d 1277 1282 (7th Cir. 1977).[4]

The District Court found that even if French had established a *prima facie* case of sex discrimination, Mead rebutted that case by articulating a nondiscriminatory reason for his termination. Mead had a reasonable belief that French had made unwelcome sexual overtures to women, and that these overtures had a demonstrable adverse effect on the work environment. If Mead had condoned such a hostile environment, it could have led to liability. *See, e.g., Vinson* v. *Taylor,* 753 F.2d 141 (D.C. Cir. 1985); *Bundy* v. *Jackson,* 641 F.2d 934 (D.C. Cir. 1981).

Finally, the District Court concluded that Mead's asserted reasons for French's termination were not pretextual. The court held that, even though it "may have reached conclusions different from those of Mead managers, it is not and should not be the Court's function to substitute its judgment for theirs unless their judgment is unreasonable or exercised in bad faith". App. at 20. This holding reflects the uniform view of the federal courts. *See Crimm* v. *Missouri Pacific*

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[4] Significantly, French failed to produce any evidence that he was treated differently than similarly situated female employees. Evidence of dissimilar treatment is essential in disparate treatment cases. *See Burdine, supra,* 450 U.S. at 258; *Brown* v. *ASD Computing Center,* 519 F. Supp. 1096, 1110 (S.D. Ohio 1981), *aff'd.* unpublished order dated March 21, 1983 (6th Cir. 1983).

Railroad, 750 F.2d 703, 713 (8th Cir. 1984); *Jones* v. *L.A. Community College District*, 702 F.2d 203, 205-6 (9th Cir. 1983); *Jones* v. *Orleans Parish School Board*, 679 F.2d 32, 38 (5th Cir. 1982).

The District Court's application of the *McDonnell Douglas* and *Burdine* standards to the facts of this case was correct in all respects. The Court of Appeals did not err in affirming judgment in favor of Mead.

III. This Case Does Not Involve An Important Question of Federal Law.

French asserts that the courts below have denied him the protection of Title VII because he is a male and that this result conflicts with the decisions of this Court. Pet. at 5-6. There is no merit in this argument. Mead does not suggest, and the District Court did not hold, that males cannot state a claim for sex discrimination under Title VII. App. at 19. The District Court simply held, based on the facts of the case before it, that French did not establish a *prima facie* case of sex discrimination, since he failed to show that he was treated differently than similarly situated female employees. In any event, the District Court gave French the benefit of the doubt and proceeded to apply a complete *Burdine* analysis. Thus, the District Court gave French every opportunity to prove his claim under Title VII. Because the facts of the case do not support his claims, there is no foundation upon which his appeal can stand.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

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